Petition

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No. 81-5181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CARMEN MACKOWSKI,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI

WILLIAM Z. SHULMAN,
Counsel of Record for Petitioner
GREENBERG & FEINER,
Attorneys for Petitioner,
Carmen Mackowski

425 59th Street,
P.O. Box 540,
West New York, New Jersey 07093
(201) 854-2200

N.J. Appellate Printing Co., Inc., So. Plainfield, New Jersey (201) 753-0200

QUESTIONS PRESENTED FOR REVIEW

1. Should this Court reverse the Order of the Court of Claims which held that *Totten v. United States*, 92 U.S. 105 (1875) precluded a right of judicial review, in an action where Petitioner sought recovery of monies and other benefits for employment services rendered while in the employ of the Central Intelligence Agency, by reason of Congress' implied overruling of *Totten* in enacting the Central Intelligence Agency Act, 50 U.S.C. 403 *et seq*, which created rights of judicial review and this Court's decision in areas of First Amendment, Freedom of Information Act requests, as well as substantial change of circumstances since *Totten* first became law?

2. Was the Court of Claims Order granting Respondent's motion dismissing the complaint, unaccompanied by affidavits and without establishing the existence of "state secret" privilege and which precluded Petitioner any discovery, or her day in court violative of Petitioner's First Amendment rights to petition the Government for redress of grievances, and rights acquired under the CIA Act, 50 U.S.C. 403e, (1)(B), (5)(A), (5)(C) and section 231?

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IN THE

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OPINION BELOW

Order and opinion of the United States Court of Claims (Nichols, P.J., Kashiwa and Smith, J.J.) dated June 12, 1981 (Pa1-4).

JURISDICTION

Certiorari to this Court is sought pursuant to 28 U.S.C.A. §§1255(1), from Order of the United States Court of Claims, dated June 12, 1981, granting Respondent's motion dismissing Petitioner's Amended Petition.

STATUTES

The statutes involved in this case are set forth below as follows:

First Amendment to the Constitution of the United States.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

50 U.S.C. §403e. Same; travel, allowances, and related expenses

Under such regulations as the Director may prescribe, the Agency, with respect to its officers and employees assigned to duty stations outside the several States of the United States of America, excluding Alaska and Hawaii, but including the District of Columbia, shall—

(1)(A) pay the travel expenses of officers and employees of the Agency, including expenses incurred while traveling pursuant to authorized home leave;

(5)(A) In the event of illness or injury requiring the hospitalization of an officer or full time employee of the Agency, not the result of vicious habits, intemperance, or misconduct on his part, incurred while on assignment abroad, in a locality where there does not exist a suitable hospital or clinic, pay the travel expenses of such officer or employee by whatever means he shall deem appropriate and without regard to the Standardized Government Travel Regulations and section 73b of Title 5, to the nearest locality where a suitable hospital or clinic exists and on his recovery pay for the travel expenses of his return to his post of duty. If the officer or employee is too ill to travel unattended, the Director may also pay the travel expenses of an attendant;

(5)(C) In the event of illness or injury requiring hospitalization of an officer or full time employee of the Agency, not the result of vicious habits, intemperance, or misconduct on his part, incurred in the line of duty while such person is assigned abroad, pay for the cost of the treatment of such illness or injury at a suitable hospital or clinic;

"Part D—Benefits Accruing to Certain Participants

"Retirement for Disability or Incapacity—Medical Examination—Recovery

"Sec. 231. (a) Any participant who has five years of service credit toward retirement under the system, excluding military or naval service that is credited in accordance with provisions of section 251 or 252(a)(2), and who becomes totally disabled or incapacitated for useful and efficient service by reason of disease, illness, or injury not due to vicious habits, intemperance, or willful misconduct on his part, shall, upon his own application or upon order of the Director, be retired on an annuity computed as prescribed in section 221. If the disabled or incapacitated participant is under sixty and has less than twenty years of service credit toward his retirement under the system at the time he is retired, his annuity shall be computed on the assumption that he has had twenty years of service, but the additional service credit that may accrue to a participant under this provision shall in no case exceed the difference between his age at the time of retirement and age sixty. Retirement for disability or incapacity may be approved only if the application is submitted before the applicant is separated from the Agency or within one year thereafter. This time limitation may

be waived by the Director for a participant or annuitant who at the date of separation from the Agency or within one year thereafter is mentally incompetent, if the application is filed with the Agency within one year from the date of restoration of the participant or annuitant to competency or the appointment of a fiduciary, whichever is earlier.

5 U.S.C. §702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94-574, §1, Oct. 21, 1976, 90 Stat. 2721.

35 U.S.C. §181 Secrecy of certain inventions and withholding of patent

Whenever publication or disclosure by the grant of a patent on an invention in which the Government has a property interest might, in the opinion of the head of the interested Government agency, be detrimental to the national security, the Commissioner upon being so notified shall order that the invention be kept secret and shall withhold the grant of a patent therefor under the conditions set forth hereinafter.

Whenever the publication or disclosure of an invention by the granting of a patent, in which the Government does not have a property interest, might, in the opinion of the Commissioner, be detrimental to the national security, he shall make the application for patent in which such invention is disclosed available for inspection to the Atomic Energy Commission, the Secretary of Defense, and the chief officer of any other department or agency of the Government designated by the President as a defense agency of the United States.

Each individual to whom the application is disclosed shall sign a dated acknowledgment thereof, which acknowledgment shall be entered in the file of the application. If, in the opinion of the Atomic Energy Commission, the Secretary of a Defense Department, or the chief officer of another department or agency so designated, the publication or disclosure of the invention by the granting of a patent therefor would be detrimental to the national security, the Atomic Energy Commission, the Secretary of a Defense Department, or such other chief officer shall notify the Commissioner and the Commissioner shall order that the invention be kept secret

and shall withhold the grant of a patent for such period as the national interest requires, and notify the applicant thereof. Upon proper showing by the head of the department or agency who caused the secrecy order to be issued that the examination of the application might jeopardize the national interest, the Commissioner shall thereupon maintain the application in a sealed condition and notify the applicant thereof. The owner of an application which has been placed under a secrecy order shall have a right to appeal from the order to the Secretary of Commerce under rules prescribed by him.

An invention shall not be ordered kept secret and the grant of a patent withheld for a period of more than one year. The Commissioner shall renew the order at the end thereof, or at the end of any renewal period, for additional periods of one year upon notification by the head of the department or the chief officer of the agency who caused the order to be issued that an affirmative determination has been made that the national interest continues so to require. An order in effect, or issued, during a time when the United States is at war, shall remain in effect for the duration of hostilities and one year following cessation of hostilities. An order in effect, or issued, during a national emergency declared by the President shall remain in effect for the duration of the national emergency and six months thereafter. The Commissioner may rescind any order upon notification by the heads of the departments and the chief officers of the agencies who caused the order to be issued that the publication or disclosure of the invention is no longer deemed detrimental to the national security. July 19, 1952, c. 950, § 1, 66 Stat. 805.

35 U.S.C. §183 Right to compensation

An applicant, his successors, assigns, or legal representatives, whose patent is withheld as herein provided, shall have the right, beginning at the date the applicant is notified that, except for such order, his application is otherwise in condition for allowance, or February 1, 1952, whichever is later, and ending six years after a patent is issued thereon, to apply to the head of any department or agency who caused the order to be issued for compensation for the damage caused by the order of secrecy and/or for the use of the invention by the Government, resulting from his disclosure. The right to compensation for use shall begin on the date of the first use of the invention by the Government. The head of the department or agency is authorized, upon the presentation of a claim, to enter into an agreement with the applicant, his successors, assigns, or legal representatives, in full settlement for the damage and/or use. This settlement agreement shall be conclusive for all purposes notwithstanding any other provision of law to the contrary. If full settlement of the claim cannot be effected, the head of the department or agency may award and pay to such applicant, his successors, assigns, or legal representatives, a sum not exceeding 75 per centum of the sum which the head of the department or agency considers just compensation for the damage and/or use. A claimant may bring suit against the United States in the Court of Claims or in the District Court of the United States for the district in which such claimant is a resident for an amount which when added to the award shall constitute just compensation for the damage and/or use of the invention by the Government. The owner of any patent issued upon an application that was subject to a secrecy order issued

pursuant to section 181 of this title, who did not apply for compensation as above provided, shall have the right, after the date of issuance of such patent, to bring suit in the Court of Claims for just compensation for the damage caused by reason of the order of secrecy and/or use by the Government of the invention resulting from his disclosure. The right to compensation for use shall begin on the date of the first use of the invention by the Government. In a suit under the provisions of this section the United States may avail itself of all defenses it may plead in an action under section 1498 of title 28. This section shall not confer a right of action on anyone or his successors, assigns, or legal representatives who, while in the full-time employment or service of the United States, discovered, invented, or developed the invention on which the claim is based. July 19, 1952, c. 950, § 1, 66 Stat. 806.

STATEMENT OF THE CASE

Petitioner became employed by the Central Intelligence Agency ("CIA") in December 1964, having agreed to perform espionage activities in Cuba. The CIA promised to pay Petitioner a starting salary of $250.00 per month the first year with yearly increments thereafter, extra compensation for hazardous employment, travel expenses, insurance, health and medical benefits and other benefits accorded a governmental employee. Petitioner remained in Respondent's employ from 1964 until 1977. Apprehended by Cuban authorities in 1969, Petitioner was tried by a Cuban tribunal, imprisoned for spying, and remained incarcerated until her release in 1977. High level governmental intercession by the United States Senate Foreign Relations Committee and its then Chairman, former Senator Frank Church, ac-

companied by much publicity and fanfare, resulted in Petitioner's release from Cuba and return to the United States.

On various occasions since, Petitioner has sought to collect from Respondent monetary compensation, medical and hospital benefits, as well as travel and resettlement expenses. Respondent paid Petitioner nothing in excess of $250.00 per month, accumulated since 1964 with interest, nor did it pay or provide to Petitioner any cost of living increments, disability, social security and pension benefits, health facilities or access to government hospitals. Petitioner has required hospitalization six times since her release, as a result of illnesses acquired while incarcerated, including hip paralysis, tuberculosis, and other disorders, and has received no assistance from Respondent in her treatment of same.

Petitioner sought relief in the Court of Claims for the balance of monies claimed by reason of her employment relationship with Respondent, together with the benefits and expenses as set forth hereinabove.

Prior to the institution of the aforesaid action, Petitioner brought suit in the United States District Court for the District of New Jersey. In that action, Petitioner alleged that Respondent's treatment and callous disregard constituted tortious and cruel and inhuman treatment, and sought damages and declaratory relief with respect to the withheld benefits. The District Court Judge dismissed the first three counts of said amended complaint and transferred that much of the fourth count sounding in contract to the Court of Claims pursuant to 28 U.S.C. §1406(c).

Respondent moved to dismiss the said transferred and amended petition pursuant to Court of Claims Rule 38(b) on the basis that the action could not be brought

"to enforce an alleged contract which, by its nature is inherently secret, and whose disclosure would be contrary to public policy."

The Court of Claims in an Order and opinion dated June 12, 1981 (Pa1-4) granted the motion and dismissed the petition, relying exclusively on the 1875 case of *Totten v. United States*, 92 U.S. 105, 23 L.Ed. 605.

The instant Writ of Certiorari follows.

REASONS FOR THE ALLOWANCE OF THE WRIT

Point I

Congressional enactment of the Central Intelligence Agency Act, Central Intelligence Agency Retirement Act, and amendments thereto, Freedom of Information Act and Decisional Law of this Court in these and First Amendment and Freedom of Information Act request cases which confer specific rights and remedies to CIA employees and to all citizens, and which manifest a clear congressional intent to abrogate the Civil War case of *Totten v. United States* and provide judicial review to an aggrieved former CIA employee have brought about the timely opportunity for this court to re-examine *Totten* and declare that it is no longer good law.

This case presents an excellent opportunity for this Court to reconsider *Totten*, and determine its continued viability. Except for opaque reference to it in a footnote in *United States v. Reynolds*, 345 U.S.1, 10 n26, 73 S.Ct. 528, 97 L.Ed.27 (1952), this Court, upon research of this writer, has had no occasion to reexamine *Totten*, to request from attorneys the submission of briefs, nor to question its present applicability. There has been little if any discussion of *Totten* since enactment of the Central Intelligence Agency Act, 50 U.S.C. §403 *et seq.*, (61 Stat. 497, July 1947, c.343, Title I, §102, and as amended thereafter); the Freedom of Information Act ("FOIA"), 5 U.S.C. §552 *et seq.*, the body of decisional law dealing with First Amendment rights, and of lawsuits brought under FOIA directly against the CIA. Thus *Totten* for its one hundred six year existence has not been seriously challenged, nor analyzed, and to the extent its holding and reasoning have been impliedly repealed, by reason of these and other changed circumstances, time

has come for this Court to render a prognosis as to whether *Totten* is still controlling.

Totten was premised on the concern that the very employment relationship of an espionage agent was a fact to be forever concealed. In talismanic words which seem somewhat weathered today, the Court intoned: "Both employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter." 92 U.S. at 105. The reason for secrecy was that ". . . a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent." *Id.* One wonders whether the evidentiary problems encountered in *Totten* (both claimant and the President deceased) as well as the historical post Civil War Reconstruction period, dictated the results therein reached. The very legal relationships between citizens and the Government were far different then than today, and there was no government agency specifically authorized to perform intelligence and national security operations.

In enacting the CIA Act, 50 U.S.C. §403 *et seq.* Congress provided for travel allowances, separation pay, relocation assistance and hospitalization benefits for CIA officers or employees engaged in overseas work. 50 U.S.C. 403e, (1)(F), (5)(A), (5)(C). The legislative purpose of these amendments was to authorize uniformity of treatment and benefit for all overseas employees irrespective the agency by which they are employed. 1960 U.S. Code Cong. and Adm. News, 86th Cong. 2nd session, p. 3338.

Section 231 of the CIA Retirement Act of 1964 as amended provides for benefits, and retirement annuity, accruing to certain participants who become disabled or incapacitated while in CIA service, and sets forth a de-

tailed system for contributions, computation of annuities, retirement for disability or incapacity, etc.

Petitioner was in Respondent's service for thirteen years during which time she was engaged in overseas field work, was incarcerated, sustained injuries and suffers present disability and incapacity arising out of and in connection with said employment. Petitioner upon her release and since has made timely demands within the CIA for the fruits of the aforecited benefits, but has never received a definitive response as to her entitlement to same. Under provisions of 5 U.S.C. §702, Petitioner is entitled to judicial review.[1]

There is implied, as well, a legislative intent to create a private remedy. Under the principles set forth in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed. 2d 386 (1969), *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed. 2d 26 (1975), and *Cannon v. University of Chicago, et al.*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed. 2d 560 (1979) a private cause of action is created by a federal statute, otherwise silent, upon the establishing of four factors. One, whether the statute was enacted for the benefit of a special class of which plaintiff is a member; two, whether there is any indication of legislative intent to create a private remedy; third, whether implication of such a remedy is consistent with the underlying purposes of the legislative scheme; and four whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the states. *Cannon v. University of Chicago, supra,* at p. 677. Petitioner by virtue of her

1. 5 U.S.C. §702 provides:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

length of service and job related injuries satisfies criteria one; undisputably, there is no state-federal issue, satisfying criteria four. The second and third criteria are met to the extent that Respondent failed to render a final and conclusive decision to provide the aforementioned benefits, despite repeated requests giving rise to Petitioner's right to sue for the enforcement of the remedy. Therefore, as the Court declared in *Sullivan v. Little Hunting Park, Inc., supra,* ". . . the existence of a statutory right implies the existence of all necessary and appropriate remedies." 396 U.S. at 239.

The fact that "state secrets" or "national security" is concerned, does not minimize the "right-remedy" postulate as discussed hereinabove. In *United States v. Halpern,* 258 F. 2d 36 (2 Cir. 1958) an inventor sued for just compensation for the fruits of his wartime invention. Halpern's patent application was declared secret, and thus withheld under the provisions of the Invention Secrecy Act, 35 U.S.C. §181 *et seq.*, and disclosure was deemed inimical to security interests. The government relied on *United States v. Reynolds, supra,* and *Totten v. United States, supra,* in opposing Halpern's right to litigate as long as the secrecy order was not rescinded. The Court thought otherwise and despite prohibitions on disclosure, and portions of the statute intimating that litigating for the recovery of compensation must await rescission of the secrecy order, it permitted Halpern his day in court by construing the language in the statute 35 U.S.C. §183 ". . . which showed an increased solicitude on the part of Congress for the rights of inventors whose applications are placed under secrecy order." *Halpern, supra,* at 42. The Court continued: "Clearly Congress failed to spell out in detail the incidents of this authority . . . but we cannot assume that Congress vested the federal courts with merely administrative responsibilities . . . or created a remedy which is entirely illusory." *Id.* at 43.

It is respectfully submitted therefore that Petitioner is entitled to judicial review of her claims, for otherwise Congress' words as set forth in Section 231, and in 50 U.S.C. §403e are illusory, and the very intention of Congress to create a remedy is frustrated. Moreover, the very promulgation of the CIA Act, and the CIA Retirement Act, seriously challenge the reasoning, underpinning and holding of *Totten*. Its continued potency, let alone viability, must be re-evaluated.

Point II

Pronouncements by this and lower courts inviting former CIA agents to judicial review of their disputes with said agency; the disclosure and discussion by this court of the very secrecy agreement disapproved of in *Totten;* and the decisional law in First Amendment cases involving state secret issues resolving in favor of the citizen, all evidence the *de facto* intention of setting aside *Totten* and permitting a former CIA agent his or her day in court.

Decisional law from this Court in the areas of "state secrets" including several CIA cases, *United States v. Marchetti,* 466 F.2d 1309 (4 Cir. 1972) *cert. den.* 409 U.S. 1063, 93 S.Ct. 553, 34 L.Ed. 2d 516 (1972); *Snepp v. United States,* 444 U.S. 507, 100 S.Ct. 763, 62 L.Ed. 2d 704 (1980); *Haig v. Agee,* ___U.S.___, 101 S. Ct. ___, 69 L.Ed. 2d 640 (1981), First Amendment decisions *infra,* and lower court FOIA cases involving the CIA, *infra,* have impliedly rejected the holding of *Totten,* and significantly undermined the premonitory language and analysis therein contained. It is respectfully submitted that these cases stand for the proposition that at the very least, the *per se* exclusion from judicial review of a *Totten* plaintiff is no longer the law; rather that some discovery, if not complete relief is to be afforded such plaintiff, to have his or her day in court.

In both *Marchetti*, and *Snepp*, the Government sued for injunctive relief. In the former case it sought a prior restraint on publication as to any possible classified information obtained by the former employee while in Respondent's employ; and in *Snepp*, for imposition of a constructive trust on profits acquired by Snepp for publishing in violation of a secrecy agreement entered into at the commencement and termination of his employ with the CIA. Although the Government prevailed in each action with respect to the relief sought, more significant and instructive was the candid disclosure and discussion by the Court in each case, and particularly in *Marchetti*, *supra*, of the availability of the judicial forum to resolve future disputes, and of its reaffirmance that the First Amendment rights of judicial redress by a former CIA employee are in no means nullified.

Snepp, *supra*, set out verbatim in a footnote the actual secrecy agreement therein involved, thus disclosing, contrary to *Totten*, the very employment relationship therein prohibited. A former agent, therefore, as appears from *Snepp* is no longer required to forever seal his lips with respect to this employment relationship, but the former agent may publish and disseminate his activities in the CIA as long as no classified information is revealed, and prepublication clearance granted.

Marchetti, *supra*, went even further, defining secrecy and its nondisclosure as intended for the protection of classified information, particularly sources, methods, operations, personnel and security measures. Nowhere is there any prohibition of a former agent or employee discussing or seeking compensation, reimbursement of expenses, health, medical and welfare benefits, travel, and other allowance, nor upon denial thereof by the Agency, of preventing the assertion of that person's constitutional rights to the redress of same. Rather, as Judge Haynsworth noted:

> "We readily agree with Marchetti that the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship. It precludes such restraints with respect to information which is unclassified or officially disclosed. . . ." Id. at 1313.

Even the secrecy oath, to the extent it purports to prevent disclosure of unclassified information, is in contravention of one's First Amendment rights. Judicial review will lie in those instances where the government seeks to curtail one's right under the First Amendment. Id. at 1317.

Petitioner herein respectfully submits that she is entitled to judicial review as approved in *Marchetti*, whereby, as long as classified information is not revealed, Petitioner may pursue relief for benefits under her statutory and contractual employment relationship, and her equitable and *quantum meruit* rights of restitution. As long as sources, methods, operations, personnel or other restricted information is not at issue, the government is not entitled to a blanket restraint on a citizen's and former CIA employee's rights to seek judicial review.

Thus *Marchetti* and *Snepp* stand for the proposition that once the proverbial "cat has been let out of the bag" and the former employee's CIA relationship revealed, judicial review may not be denied. Petitioner's release from Cuban jail in 1977 was well publicized as was her involvement with the CIA, and at no time was there a disavowal of same by the Government. Moreover, when Petitioner instituted suit in the District Court, her status as a former CIA employee was never contradicted, nor a defense raised of "state secret."

To permit the *per se Totten* rule to stand in the face of the First Amendment claims, would not only minimize *Marchetti*, and the First Amendment itself, but ignore the litany of cases handed down by this court since *Totten*, even those dealing with state secrets.

The First Amendment includes all of the freedoms enshrined in the first of the Bill of Rights, including the right to petition the government, right of redress, and right of having one's day in court. The right is not limited to petitioning Congress, but extends to administrative agencies and the courts. *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L. Ed.2d 464 (1961); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 611, 30 L. Ed.2d 642 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657, 669-671, 85 S.Ct. 1585, 1595-94, 14 L. Ed.2d 626 (1965). Before a First Amendment freedom can be assailed, there must be a weighing and balancing process. As the Court noted in *United States v. Carolene Products, Co.*, 304 U.S. 144, 152 n.4, 58 S.Ct. 778, 82 L.Ed. 234 (1938), the presumption is in favor of affirming the rights and against the government's intention of infringing upon same. Even in those instances where national security prevails at the expense of civil liberties guaranteed by the Bill of Rights, all efforts are made to preserve a litigant's rights to maintain his lawsuit; *e.g. Jabara v. Kelly*, 476 F. Supp. 561 (E.D. Mich. 1979); *Kinoy v. Mitchell*, 67 F.R.D. 1 (S.D.N.Y. 1975). Military regulations that impede and impose prior restraints upon First Amendment rights are upheld, as in *Marchetti, supra*, only where a clear danger would result to the loyalty, discipline or morale of its members. *Brown v. Glines*, 444 U.S. 348, 100 S. Ct. 594, 62 L. Ed.2d 540 (1980); *Greer v. Spock*, 424 U.S. 828, 840, 96 S.Ct. 1211, 47 L. Ed.2d 505 (1976). But to impose a prior restraint upon the First Amendment

right, the Government must justify by a heavy burden its need for same. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.Ed. 2d 1 (1971). Waving the red flag of "state secrets" as in *Totten*, absent the dangers of secrecy as defined in *Marchetti*, imposes the very prior restraint repeatedly disapproved, and renders meaningless the defense, when valid, of national security. In *New York Times Company v. United States*, 403 U.S. 713, 730, 91 S. Ct. 2140, 2149, 29 L.Ed. 2d 822 (1971) Mr. Justice Stewart cautioned against the indiscriminate excercise of randomly raising the secrecy or national security defense:

> "For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or careless, and to be maintained by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained." 403 U.S. at 730.

Point III

Freedom of Information Act decisions requiring assertion of a state secret privilege by affidavit particularizing and indexing grounds of exemption from disclosure and affording a litigant means of discovery and judicial review thereof ought apply to a *Totten* claimant. There no longer appears any sound reason distinguishing between *Totten*, *Reynolds* and FOIA claimants, and only upon a re-examination by this court of the *Totten* holding will such equality of treatment be afforded.

The assertion by the Government of "state secret" or "national security" defense ought to be raised, if at all, in

the manner and procedure delineated in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. den.* 415 U.S. 977, 94 S. Ct. 1564, 39 L.Ed. 2d 873 (1974). Furthermore the distinction presently existing in footnote 26 of *United States v. Reynolds*, 345 U.S. 1, 10 (1952) as between the assertion of the ordinary national security privilege and that of the *Totten* privilege, should be abolished.

In the *non-Totten* situation, the assertion of national security privilege must be raised by formal claim under circumstances indicating the reasonable possibility that military or classified secrets are involved. The plaintiff must then retort with a showing of necessity for the privileged documents, and the Court will thereupon, and *in camera* if necessary, determine how far it will probe without requiring a confrontation and sustaining the privilege. In *Totten* claims, however, the assertion of national security can be made on the pleadings alone, without the need to assert a formal claim or a showing by affidavit.

No valid basis any longer exists for distinguishing *Reynolds* and *Totten* type situations. If the main concern in all state secret cases is the disclosure of classified information, or of sources, methods, operations and personnel, a claimant, as Petitioner here, poses no greater danger by her mere status, than that of any other litigant inviting the assertion of the privilege. Present decisional law, *Totten* excluded, provide ample protection to the Government in its assertion of the privilege, when proper, and imposes on it, on balance, only a slight burden.

In *Baker v. CIA*, 580 F.2d 664 (D.C. Cir. 1978) former CIA employees, discharged because they were considered surplus, sued under FOIA requesting documents as to hiring or discharging employees, and regulations concerning vacancy notices. Notwithstanding the

fact that the CIA was shielded from disclosing salaries or personnel, the Court required of it the submission of an affidavit in accordance with the standards laid down in *Vaughn v. Rosen, supra*, certifying with particularity and indexing the justification for the exemption. While the *Baker* Court did not require an *in camera* hearing, it admonished the CIA against asserting a wholesale refusal to turnover the documents, and cautioned that "[O]nly the specific information on the CIA's personnel and internal structure that is listed in the statute will obtain protection from disclosure. *Baker v. CIA, supra*, 580 F.2d at 669. An interesting sidenote to *Baker* was the permission granted by the CIA to appellants and their attorney to examine and take notes on the requested documents for use in any possible litigation over their discharge, in return for the dismissal of the lawsuit. Id. n. 21 at 669.

Decisions in other FOIA cases have taken the position that the District Court should attempt to create as complete a public record as possible. The CIA is required to prepare a *Vaughn v. Rosen* affidavit, subject to challenge by the requesting party, by way of interrogatories and discovery. Thereafter, while the agency, to prevail on its summary judgment motion, must submit a further affidavit certifying whether it will confirm or deny the requested records, an in camera hearing will be ordered, in any of the following situations:

1. Whether based on affidavits or oral testimony the withheld information is clearly exempt and contains no segregable non-exempt portions;

2. Where the agency merely parrots in conclusory terms the language of exemption;

3. Bad faith on the part of the agency;

4. Disputes regarding contents of the documents;

5. Where the agency itself proposes *in camera;*

6. Strong public interest in disclosure.

Environmental Prot. Agency v. Mink, 410 U.S. 73, 93 S. Ct. 827, 35 L.Ed.2d 119 (1973); *Allen v. Central Intelligence Agency*, 636 F.2d 1281 (D.C. Cir. 1980); *Gardels v. Central Intelligence Agency*, 637 F.2d 770 (D.C. Cir. 1980); *Weissman v. Central Intelligence Agency*, 565 F.2d 692 (D.C. Cir. 1977); *Phillippi v. Central Intelligence Agency*, 546 F.2d 1009 (D.C. Cir. 1976). *But see, Hayden v. National Security Agency*, 608 F.2d 1381 (D.C. Cir. 1979) *cert. den.* 446 U.S. 937, 100 S. Ct. 2156, 64 L.Ed.2d 790 (1980).

Petitioner who sacrificed thirteen choice years of her life in the service of Respondent should not be treated less fairly and with more restrictions than any other citizen bringing suit to review CIA documents, or to litigate rights secured to her by statute and contract. No basis exists to distinguish between foreclosing Petitioner but permitting a *Baker* plaintiff, or a *Marchetti* as former CIA employees, from seeking judicial review to remedy breaches in their contractual relationships with Respondent. There is less a likelihood that Petitioner's claims on their face, require disclosure of exempt documents than in any of the aforementioned cases. *Phillippi* involved a sensitive spy ship mission; *Allen*, investigative reports of a possible Oswald conspiracy in the Kennedy assassination; *Gardels*, the CIA relationship with recruitment and activity at the University of California campuses. In each case, the plaintiff was permitted discovery, and in each the concern for the activities prohibited in *Marchetti, supra*, was heeded without injury to Respondent. Establishment of Petitioner's claims can be had by objective documentation of actual benefits accorded her, moneys paid, and neutral judicial evaluation in accordance with statutes and governmental regula-

tion. Sources, methods, operations and other classified information are not relevant to her claim, and no issues of secrecy or sensitive documentation would be violated. The added concerns voiced in *Totten* have no applicability whatever here, as statutorily created benefits delimit any indiscriminate assault on the courts of excessive claims; and the *de facto* revelations of CIA involvement in global political affairs dissipates the fear of compromise or embarrassment.

The Fourth Circuit in *Farnsworth Canner, Inc. v. Grimes*, 635 F. 2d 268 (4 Cir. 1980) suggested means to reduce tension arising between the parties by hearing the matter in camera, giving clearance to petitioner's counsel, and sealing all records. The court there noted that "It is better, however, for the process to function under such a strain that not to function at all to resolve a bona fide dispute of some significance." *Id.* at 276.

CONCLUSION

For all the reasons herein, it is respectfully submitted that certiorari should be granted.

Respectfully Submitted,

/s/ William Z. Shulman
WILLIAM Z. SHULMAN
Counsel of Record for Petitioner

GREENBERG & FEINER
Attorneys for Petitioner.

APPENDIX

IN THE

UNITED STATES COURT OF CLAIMS

No. 605-80C

CARMEN MACKOWSKI

v.

THE UNITED STATES

Contracts; alleged agreement with CIA for espionage activities; lack of waiver of privilege.

William Z. Shulman, attorney of record, for plaintiff. *Greenberg and Feiner*, of counsel.

Kathleen A. Flynn, with whom was *Acting Assistant Attorney General Thomas S. Martin*, for defendant. *E. Page Moffett*, Central Intelligence Agency, of counsel.

Before NICHOLS, *Judge*, Presiding, KASHIWA and SMITH, *Judges*.

ORDER

(Filed June 12, 1981)

This case is before us on defendant's motion to dismiss plaintiff's petition. We agree with defendant and thus dismiss the petition.

Plaintiff alleges she was an employee of the Central Intelligence Agency (CIA), hired to perform espionage

activities in Cuba. Her contract of employment allegedly commenced in December 1964 and ceased when she was released from a Cuban prison in 1977. Plaintiff further alleges the defendant paid some of the money owed her but has refused to pay the balance she claims is owed: expenses, related costs, medical bills, and various disability, social security and other compensation benefits.

Defendant's motion to dismiss is premised on *Totten v. United States*, 92 U.S. 105 (1875), and our order in *Simrick v. United States*, Ct. Cl. No. 45-80C (order entered June 27, 1980).

Totten is very similar to our case, involving the beneficiaries of an estate who sued the United States for money allegedly owed the decedent as a result of espionage work performed during the Civil War. The Supreme Court assumed the decedent had a contract with President Lincoln to "proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States * * * for which services he was to be paid $200 a month." 92 U.S. at 105-106.

The Supreme Court held that such a claimant could not enforce his contract in the Court of Claims:

> The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is

implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service, with liability to publicity in this way, would be impossible; and, as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery. [*Id.* at 106-107.]

Simrick applied the holding of *Totten* to a supposed agent of the CIA who alleged *Totten*, which involved a direct spy, was inapplicable to himself, a more or less administrative employee. This court rejected that analysis on the ground that the assertion and defense of such a case would reveal secret matters which should not be disclosed. Relying then on *Totten*, we held the secrecy imposed by such espionage-type contracts precludes any action for their enforcement.

Plaintiff here does not even mention the *Simrick* order. Instead, plaintiff alleges that under *United States*

v. Reynolds, 345 U.S. 1 (1953), *Totten* is no longer the law. The panel in *Simrick*, however, disagrees with plaintiff; it held the *Totten* holding was summarily reaffirmed in *United States v. Reynolds*, 345 U.S. at 11 n.26. Order at 4. Thus, we reject that argument of plaintiff's.

Plaintiff also asserts that the defendant waived a *Totten*-type defense. While plaintiff was released from the Cuban prison due to the efforts of then Senator Frank Church, such action cannot be construed as a public confirmation or publication that plaintiff performed espionage services for the United States. *Cf. United States v. Marchetti*, 446 F.2d 1309, 1318 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972) (rumor and speculation are not the equivalent of public disclosure; and the presence of that kind of surmise is no reason for avoidance of contraints on publication). Nor can defendant's assertion before the district court that such court lacked jurisdiction under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* (1976), because plaintiff failed to file an administrative claim, as required by 28 U.S.C. § 2675, constitute a public admission of plaintiff's allegations.

In short, this case is controlled by *Totten* and *Simrick*. We are satisfied that the defendant has properly invoked this privilege. Because of the nature of the parties' alleged agreement, it is obvious the claim could not be prosecuted or defended without revealing secret matters which should not be disclosed. Hence, "The secrecy which [the alleged contract] impose[s] precludes any action for [its] enforcement." *Totten*, 92 U.S. at 107. *Cf. Snepp v. United States*, 444 U.S. 507 (1980) *(per curiam)* (highlighting the importance of confidentiality with respect to intelligence gathering).

IT IS THEREFORE ORDERED, without oral argument, that defendant's motion to dismiss is granted and the petition is dismissed.

BY THE COURT

/s/ Shiro Kashiwa
SHIRO KASHIWA
Judge

Opposition

Office - Supreme Court, U.S.
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CLERK

No. 81-513

In the Supreme Court of the United States

OCTOBER TERM, 1981

CARMEN MACKOWSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

ANTHONY J. STEINMEYER
MARILYN S. G. URWITZ
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Court of Claims correctly concluded that *Totten* v. *United States*, 92 U.S. 105 (1875), bars petitioner's lawsuit for enforcement of an alleged espionage contract.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

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CARMEN MACKOWSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the Court of Claims (Pet. App. 1a-5a) is unreported.

JURISDICTION

The judgment of the Court of Claims was entered on June 12, 1981. The petition for a writ of certiorari was filed on September 10, 1981. This Court's jurisdiction is invoked under 28 U.S.C. 1255(1).

STATUTES INVOLVED

Section 201(c) of the Central Intelligence Agency Retirement Act of 1964, 50 U.S.C. 403 note, provides:

> In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of sec-

> tion 102(d)(3) of the National Security Act of 1947, as amended (50 U.S.C. 403(d)(3) [subsection (d)(3) of this section], that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, and notwithstanding the provisions of the Administrative Procedure Act * * * or any other provisions of law, any determinations by the Director authorized by the provisions of this Act shall be deemed to be final and conclusive and not subject to review by any court.

Section 7 of the Central Intelligence Agency Act of 1949, 50 U.S.C. 403g, provides:

> In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of * * * any * * * law which require[s] the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency * * * .

The Administrative Procedure Act provides, in pertinent part, 5 U.S.C. 701(a):

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

STATEMENT

In May 1980, petitioner brought an action in the United States District Court for the District of New Jersey alleging that in 1964 she became a spy for the Central Intelligence Agency (CIA) in Cuba; that in 1969, because of the CIA's negligent failure to train her adequately, she was captured and imprisoned in Cuba until 1977; that, as a result, she suffered certain medical disabilities for which the CIA should reimburse her; and that the CIA had not paid her a portion of the salary, medical charges, and other expenses that it had purportedly agreed to pay at the time petitioner began her service with the agency (App. A, *infra*, 1a).[1]

The district court determined that it lacked jurisdiction over petitioner's tort claim against the CIA because, *inter alia*, she had failed to present those claims administratively as required by the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2675(a) (App. A, *infra*, 2a). The district court also ruled that it had no jurisdiction over petitioner's breach of contract claim, because the claim exceeded $10,000 and was therefore reserved exclusively to the Court of Claims under the Tucker Act, 28 U.S.C. 1346(a)(2), 1491 (App. A, *infra*, 3a-4a). The contract action was ordered transferred to the Court of Claims (App. B, *infra*).

Before the Court of Claims, petitioner again alleged that in 1964 the CIA had employed and trained her to perform espionage services in Cuba, that she had remained thus employed until 1977, and that the CIA had not paid her all of the salary and expenses due

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[1] We have reproduced, in an appendix to this brief, pertinent portions of the oral opinion and the final judgment of the United States District Court for the District of New Jersey (Apps. A and B, *infra*).

under the purported espionage contract (Pet. App. 1a-2a).

The Court of Claims granted the government's motion to dismiss, finding petitioner's action barred under this Court's decision in *Totten* v. *United States*, 92 U.S. 105 (1875), and by the recent Court of Claims ruling in *Simrick* v. *United States*, No. 45-80C (Ct. Cl. June 27, 1980) (App. C, *infra*, 6a-10a). Under the rationale of those decisions, the very nature of an alleged contract for espionage, as an inherently secret service to the state, precludes, in the interest of national security, any action for its enforcement. This petition followed on September 10, 1981.

While she was pursuing the contract matter in the Court of Claims, petitioner appealed the district court judgment to the United States Court of Appeals for the Third Circuit. On September 23, 1981, the Third Circuit affirmed without opinion the district court order dismissing petitioner's tort claims and transferring her contract action to the Court of Claims.

ARGUMENT

1. The Court of Claims correctly concluded that *Totten* v. *United States*, 92 U.S. 105 (1875), required dismissal of petitioner's lawsuit for breach of an alleged contract for espionage. Because secrecy is a necessary condition of any espionage contract, *Totten* quite logically foreclosed actions to enforce such agreements. *Id.* at 106-107. Any suit for compensation under an alleged contract of this type, *Totten* holds, would inevitably disclose what the alleged agent has promised never to reveal—and what public policy forbids him to reveal for the protection of the country and of those who have engaged in espionage. *Ibid.* Indeed, "[t]he publicity [resulting from such] an action would itself be a breach of a contract [for espionage], and thus defeat a recov-

ery." *Id.* at 107. Determinations with respect to payment under such contracts are thus committed totally to the discretion of the employing agency. *Ibid.*

As the Court of Claims found (Pet. App. 2a), *Totten* is precisely applicable here, because petitioner has charged that the CIA employed her to perform espionage in Cuba in exchange for a salary and various benefits and that the employment ended without payment of certain expenses allegedly due. As in *Totten*, petitioner could not prove that she is entitled to recover on her claims without revealing the details of the alleged contract, the espionage work she had actually performed, and the extent of the action taken by the CIA pursuant to the contract. All of these are matters that petitioner, if she indeed was an espionage agent, like the agent in *Totten*, has promised never to disclose. In fact, if her allegations are true, petitioner has breached her promise of secrecy, and potentially jeopardized our national security, by the very act of filing her lawsuit. See 92 U.S. at 107.

The principle of *Totten* is so well accepted that, as petitioner acknowledges (Pet. 11), she is the only litigant to challenge it in the 106 years since that case was decided. Indeed, this Court and others have affirmed the vitality of *Totten* without reservation. See, *e.g.*, *United States* v. *Reynolds*, 345 U.S. 1, 11 n.26 (1953); *Simrick* v. *United States*, No. 45-80C (Ct. Cl. June 27, 1980) (App. C, *infra*, 9a-10a); *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 271 (4th Cir.) (panel), rev'd en banc on other grounds, 635 F.2d 281 (1980); *Zwiebon* v. *Mitchell*, 516 F.2d 594, 625 & n.80 (D.C. Cir. 1975) (plurality), cert. denied, 425 U.S. 944 (1976); *Nixon* v. *Sirica*, 487 F.2d 700, 713 & n.57 (D.C. Cir. 1973); *Ethyl Corp.* v. *EPA*, 478 F.2d 47, 51 n.18 (4th Cir. 1973).

2. Petitioner does not contend that her case falls outside the rule of *Totten*. Rather, she argues (Pet. 11-23) that this Court should overrule that decision because certain statutes and recent cases have, by implication, rendered *Totten* obsolete. However, to the extent that the statutes and cases on which petitioner relies are relevant at all, they serve only to reenforce the holding in *Totten*. There is, accordingly, no need for a reevaluation of *Totten*, and there is no other reason for further review in this case.

a. Petitioner contends (Pet. 12) that the Central Intelligence Agency Retirement Act of 1964, 50 U.S.C. 403 note (Pet. 3-4), and the Central Intelligence Agency Act of 1949, 50 U.S.C. 403 *et seq.* (Pet. 2-3), which authorize payment of retirement benefits and various expenses to certain CIA employees, imply a right to judicial review for espionage agents who challenge the amount that the CIA has paid them.[2]

Petitioner tacitly concedes that there are no provisions in either of these statutes that specifically permit judicial review. Rather, she contends that, in passing these laws, Congress implicitly overruled *Totten*. But elementary principles of construction require that statutes be interpreted in harmony with existing decisional law absent a clear showing that Congress intended otherwise. See, *e.g.*, *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952). In this case, petitioner cannot overcome that hurdle, even assuming that she is a covered CIA "employee" to whom these statutes were meant to apply.[3] Rather than

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[2] Petitioner did not raise this argument in opposition to the motion to dismiss in the Court of Claims, although she did present it to the Third Circuit, which affirmed the district court judgment against her without opinion.

[3] See Section 201(a), 50 U.S.C. 403 note (authorizing a retirement system for "a limited number of employees" of

overruling *Totten*, these statutes echo the rationale of that decision and, in the interest of national security, preclude judicial enforcement of, at the very least, any benefits they confer with respect to espionage services.

The CIA Retirement Act expressly bars judicial review of actions taken under its provisions. Section 201(c) of that Act provides as follows (emphasis added):

> *In the interests of the security of the foreign intelligence activities of the United States* and in order further to implement the proviso of section 102(d)(3) of the National Security Act of 1947, as amended (50 U.S.C. 403(d)(3)), that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, and notwithstanding the provisions of the Administrative Procedure Act * * * or any other provisions of law, *any determinations by the Director authorized by the provisions of this Act shall be deemed to be final and conclusive and not subject to review by any court.*

See also S. Rep. No. 1589, 88th Cong., 2d Sess. 8 (1964) (determinations authorized by this Act are

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the CIA) and Section 5 of the CIA Act of 1949, 50 U.S.C. 403e (allowing payments to "officers and employees" of the CIA).

Petitioner's allegation that she was a government employee is inconsistent with her position in the district court that she was entitled to recovery under the Federal Tort Claims Act, which is generally inapplicable to federal employees. See *Johansen* v. *United States*, 343 U.S. 427, 439-440 (1952). The arrangement petitioner claims to have had with the CIA might well be described as that of "independent contractor" rather than employee.

"final and conclusive and not subject to review by any court").[4]

Administrative determinations under the CIA Act of 1949, such as an alleged refusal to pay petitioner's travel expenses under Section 5, 50 U.S.C. 403e, are similarly unreviewable. The CIA Act manifests a clear congressional intent to protect from disclosure precisely the sort of information the CIA would have to reveal if it were forced to litigate a claim based on the terms of an alleged contract for espionage services—*i.e.*, names, functions, and salaries of CIA personnel. As Section 7 of the 1949 Act, 50 U.S.C. 403g, provides (emphasis added):

> *In the interests of the security of the foreign intelligence activities of the United States* and in order further to implement the proviso of section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, *the Agency shall be exempted from the provisions of* * * * *any* * * * *law which require*[*s*] *the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency* * * * .

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[4] Section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. 403(d)(3), referenced in Section 201(c) of the Retirement Act, provides as follows:

> [I]t shall be the duty of the [CIA] * * *
>
> (3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: *Provided* * * * [t]hat the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure[.]

See also S. Rep. No. 106, 81st Cong., 1st Sess. 1 (1949) (Act intended to protect "confidential nature of the [CIA's] functions"). Cf. *Baker* v. *CIA*, 580 F.2d 664, 667-669 (D.C. Cir. 1978) (50 U.S.C. 403g permits CIA to deny personnel data sought under the Freedom of Information Act without making an independent showing of national security justification).[6]

Thus, the express language and the legislative history of these statutes show that Congress intended to preclude, not to provide, a right to judicial review of CIA actions where the terms of an alleged contract for espionage are at issue. A court, therefore, may not recognize a right of review. See, *e.g.*, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979). Since this result is consistent with *Totten*, it represents a proper application of the rule of statutory construction favoring harmony with pre-existing decisional law. See *Isbrandtsen Co.* v. *Johnson*, *supra*, 343 U.S. at 783.

By virtue of the same barriers to review discussed above, petitioner also is mistaken in arguing (Pet. 13) that she has a cause of action under the Administrative Procedure Act. It is clear that *Totten* and the relevant statutes "preclude judicial review," 5 U.S.C. 701(a)(1), and commit CIA action in this area to "agency discretion," 5 U.S.C. 701(a)(2), thus rendering the APA inapplicable. See also 5 U.S.C. 702 (APA does not affect other limitations on judicial review or court's duty to dismiss actions on other appropriate grounds); *Califano* v. *Sanders*, 430 U.S. 99, 105-107 (1977) (APA does not confer independent subject-matter jurisdiction).

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[6] Although Congress, in 1960, amended 50 U.S.C. 403e, the employee expenses section of the CIA Act upon which petitioner relies, it left 50 U.S.C. 403g intact.

b. Petitioner also contends (Pet. 11-19) that judicial decisions raising national security issues in recent years have effectively overruled *Totten*. As with her argument that *Totten* has been statutorily overruled, petitioner bears a heavy burden in attempting to show that the decisions she cites—many of them from the lower courts—are so totally irreconcilable with *Totten* that *Totten* is no longer good law. See, *e.g.*, *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). Like the statutes she relies upon, however, petitioner's cases, where relevant at all, simply reinforce the *Totten* privilege for inherently secret information such as the terms of an espionage agreement.

For example, petitioner cites (Pet. 15-17) *Snepp* v. *United States*, 444 U.S. 507 (1980), as evidence that *Totten* is no longer controlling. As the Court of Claims observed (Pet. App. 4a), however, *Snepp* is a powerful restatement of the necessity for confidentiality in intelligence gathering. It holds that where a former agent has broken his promise not to publish unclassified information about the CIA without prior clearance and not to divulge any classified information at all, he will be deprived of any profits resulting from his breach by means of a constructive trust on such profits for the benefit of the government. 444 U.S. at 514-516. The fact that *Snepp* leaves room for publication of unclassified material where the CIA has determined that publication will not jeopardize vital national interests adds nothing to petitioner's cause. The existence of an espionage agreement, if true, is on its face a classified matter. Thus, under *Snepp*, as under *Totten* and *Reynolds*, neither pre-publication clearance nor any analogous procedure is a requisite for protecting such material from disclosure. In *United States* v. *Marchetti*, 466

F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972), the court of appeals enforced a similar promise not to publish CIA-related material prior to a determination that the material was not secret. Since, in *Totten* and *Reynolds*, this Court has already determined that the existence and terms of espionage agreements are by nature secret, *Marchetti* does not advance petitioner's argument.[6] Cf. *Baker* v. *CIA*, *supra*, 580 F.2d at 668 (where Congress has already determined that CIA's personnel data should not be disclosed, CIA need not reevaluate that issue on a case-by-case basis).

The Freedom of Information Act cases relied on by petitioner (Pet. 19-23) are likewise unavailing. These cases do not suggest that the existence and substance of an alleged espionage agreement should be the focus of any form of discovery, *in camera* proceeding, or affidavit in a lawsuit brought to collect payments purportedly due under such a contract. Indeed, as noted above, the *Baker* case cited by petitioner specifically authorizes the CIA to deny out-

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[6] The First Amendment interests that, according to petitioner (Pet. 17, 18-19), entitle her to judicial review are subject to the government's "compelling interest in protecting * * * the secrecy of information." *Snepp* v. *United States*, *supra*, 444 U.S. at 509 n.3. Moreover, when petitioner entered into the alleged espionage contract, if in fact she did, she was on notice that breaches of the agreement would not be actionable in court.

As the Court of Claims noted (Pet. App. 4a), there is no basis for petitioner's assertion (Pet. 17) that either the government's reliance on other valid grounds for dismissal of her district court lawsuit, or the publicity allegedly surrounding her release from prison, should permit her now to divulge the secret agreement she supposedly had with the CIA. See *United States* v. *Marchetti*, *supra*, 466 F.2d at 1318 (rumor does not constitute either disclosure or a ground for avoiding constraints on release of state secrets).

right any information concerning the "organization, functions, names, * * * [or] salaries" of CIA personnel without presenting any independent national security justification and without submitting to an *in camera* inspection of documents. 580 F.2d at 668-669.

Finally, petitioner contends (Pet. 21) that the CIA should be required to justify its refusal to divulge information about the espionage arrangement alleged here by submitting a detailed affidavit. However, in light of the broad powers conferred upon the CIA (see pages 6-9, *supra*), the motion to dismiss, citing *Totten*, provided the necessary justification for dismissal of this lawsuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
J. PAUL MCGRATH
Assistant Attorney General
ANTHONY J. STEINMEYER
MARILYN S. G. URWITZ
Attorneys

NOVEMBER 1981

APPENDIX A

[Transcript of pertinent portions of the oral opinion in *Mackowski* v. *United States*, No. 80-1289 (D.N.J. Oct. 20, 1980)]

* * * * *

[29] THE COURT: In this action against the United States, plaintiff Carmen Mackowski advances a number of claims arising out of her affiliation with the Central Intelligence Agency between 1964 and 1977. In her Amended Complaint, she alleges that because the CIA negligently failed to "properly train, supervise and monitor" her after hiring her in December, 1964 to perform espionage activities in Cuba, she was arrested by Cuban authorities in January 1969 and incarcerated in a Cuban prison until 1977. While in prison, she alleges, she developed a tumor in her left hip which resulted in paralysis, contracted pneumonia which led to a tumor in her left lung and suffered from amnesia attacks. All these injuries, she asserts, proximately resulted from the CIA's negligence.

Plaintiff further alleges that the CIA has failed to honor certain contractual promises which it made at the time she was hired regarding yearly increments in compensation, provision of insurance and reimbursement for costs, medical bills and other expenses. She seeks a declaratory judgment that she is entitled to these contractual benefits.

Finally, plaintiff makes several [30] constitutional claims. She alleges that she has been deprived of property, in the form of various disability and other health benefits, and liberty without due process of law, in violation of the Fifth Amendment; that she has been subjected to "cruel and inhuman treatment" by

the Government in violation of the Eighth Amendment; and that her "service to the defendant amounted to a badge . . . of slavery" in violation of the Thirteenth Amendment.

Jurisdiction is alleged to exist under the Federal Tort Claims Act, 28 U.S.C. Sections 1346(b) and 2671 *et seq.*; the Central Intelligence Agency Retirement Act of 1964, 50 U.S.C. Section 403; the Declaratory Judgment Act, 28 U.S.C. Section 2201; and the Fifth, Eighth and Thirteenth Amendments to the United States Constitution. The plaintiff seeks declaratory relief as to her contract rights and damages in excess of $10 million for the balance of her claims.

* * * * *

[31] As the Count I, the plaintiff asserts that the Central Intelligence Agency's negligence caused her physical and emotional injury and seeks an award of damages against the United States. The defendant argues, however, that she failed to comply with the requirement of the Federal Tort Claims Act that she submit a written claim for a sum certain to the appropriate federal agencies for filing a court action and therefore this Court lacks jurisdiction over her claim.

* * * * *

[36] This Court * * * is lacking in jurisdiction and Count I must be dismissed.

As to Counts II and III, in Counts II [37] and III, the plaintiff asserts that she has been deprived of liberty and property without due process of law, that she has been subjected to cruel and inhuman treatment by the government, and that she has been subjected to the badges and indicia of slavery in violation of the Fifth, Eighth and Thirteenth Amendments to the Constitution. For these claims also she seeks

an award of damages against the United States. Because the plaintiff has brought her action not against officials of the CIA in their individual capacity but against the United States alone, the defendant argues that the claim is barred by the doctrine of sovereign immunity.

* * * * *

[39] [T]his Court has no power to grant relief as to any of the constitutional claims against the United States. Counts II and III of the Complaint must be dismissed.

As to Count IV, in Count IV of her Amended Complaint, plaintiff seeks declaratory relief as to her contractual rights against the Central Intelligence Agency. Jurisdiction is asserted under the Declaratory Judgment Act, 28 U.S.C. Section 2201. The defendant argues that jurisdiction may not properly be asserted under the Declaratory Judgment Act and that the sole forum in which contract claims in excess of $10,000 may be asserted against the United States is the Court of Claims.

In the Tucker Act, Congress conferred jurisdiction upon the Court of Claims "to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." Under 28 U.S.C. Section 1346(a)(2), the District Court has jurisdiction, concurrent with the Court of Claims, to hear a contract claim against the United States [40] "not exceeding $10,000 in amount." This Court has no jurisdiction, however, to hear a contract claim which seeks more than $10,000 in damages from the United States. *Commonwealth of Pennslyvania* v. *National Association of Flood Insurers*, *supra*. at 25. Even if the

plaintiff were to cast the relief she seeks in monetary terms, therefore, the aggregate of her claims would clearly exceed $10,000.

Should plaintiff choose to waive any amount sought in excess of $10,000, this Court would have jurisdiction to hear the contract claim.

The plaintiff seeks not monetary but declaratory relief and asserts jurisdiction under the Declaratory Judgment Act. The Declaratory Judgment Act, however, does not constitute an independent basis of jurisdiction, but merely enlarges the range of remedies available to a party who has properly asserted jurisdiction upon an underlying claim. *Skelly Oil Co.* v. *Phillips Co. 339 U.S. 667 (1950)*; see also *Duke Power Co.* v. *Carolina Environmental Study Group, 438 U.S. 59, 98 (1978)*. Since this Court lacks jurisdiction to consider a contract claim against the United States in an action for damages in excess of $10,000, it also lacks jurisdiction to render a declaration of the [41] parties' rights on the same claim. Count IV of the Amended Complaint, therefore, must be dismissed as well.

The Government is requested to submit the appropriate form of order dismissing the action in its entirety unless plaintiff waives all claims for damages on Count IV in excess of $10,000, in which event the order shall provide for dismissal of all counts except Count IV and shall provide Count IV claims shall be limited to an amount less than $10,000.

* * * * *

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Hon. Dickinson R. Debevoise

Civil Action No. 80-1289

CARMEN MACKOWSKI, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed Oct. 30, 1980]

ORDER

This matter having been opened to the Court on application of the United States of America for an Order dismissing this action as to the United States of America pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure; and plaintiff having appeared in opposition through her attorneys; and the Court having read and considered the submissions of the parties and having heard the arguments of counsel; and having rendered its oral opinion from the bench, and good and sufficient cause therefore appearing.

IT IS on this 30th day of October, 1980

ORDERED that the First, Second and Third Causes of Action in the Amended Complaint be and the same hereby are dismissed with prejudice and without costs; and it is further

ORDERED that the remainder of the Amended Complaint be and the same hereby is transferred to the Court of Claims pursuant to 28 U.S.C. § 1406(c).

/s/ Dickinson R. Debevoise
DICKINSON R. DEBEVOISE
Judge
United States District Court

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS

No. 45-80C
A.H. SIMRICK

v.

THE UNITED STATES

Contracts; alleged agreement with CIA for undercover activities; *Totten* v. *United States*, 92 U.S. 105.

[Filed Jun. 27, 1980]

Before DAVIS, *Judge*, Presiding, KUNZIG and BENNETT, *Judges*.

ORDER

The petition of plaintiff A.H. Simrick alleges that, from 1969 through 1976, he entered into a contract with the Government (acting through the Department of State and the Central Intelligence Agency) providing that (a) defendant was to pay plaintiff an initial retainer of $5,000; (b) defendant was to pay plaintiff $20,000 per year as salary; (c) plaintiff was to set up a business in Mauritius to act as a "cover" for agents of the CIA and to provide information; (d) plaintiff was to provide defendant with field offices without identification badges; (e) plaintiff was to provide a meeting place for the CIA in Mauritius; (f) defendant was to buy all the output of plaintiff's business produced in Mauritius at the fair market rate and was to wholly support plaintiff's company in

Mauritius; and (g) defendant was to pay all moving and resettling costs of plaintiff. The petition then alleges that (i) plaintiff carried out his agreement and formed two companies, Le Baron and Le Sega, to produce, manufacture, and sell ties; (ii) defendant has refused to pay plaintiff anything more than $9,300, the bulk of which was received in 1978; and (iii) plaintiff is due $219,000 (plus costs and interest), "including loans the Plaintiff was forced to procure to keep the company in operation as a result of the Defendant's failure to purchase the output of the Plaintiff and to support the company."

Defendant has moved to dismiss the petition, mainly on the authority of *Totten* v. *United States*, 92 U.S. 105 (1875). In that more-than-a-century-old decision coming from this court, the Supreme Court assumed that the plaintiff's decedent has a contract with President Lincoln (made in July 1861) by which the decedent "was to proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States, and to report the facts to the President; for which services he was to be paid $200 a month." It was also assumed that in fact the decedent was only reimbursed his expenses. The Supreme Court had no difficulty with the President's authority to make such a contract, but it held that nevertheless the claimant could not enforce the contract in the Court of Claims. "The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have under-

stood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed to the serious detriment of the public. * * * The secrecy which such contracts impose precludes any action for their enforcement. * * *" 92 U.S. at 106-07.

Defendant says that plaintiff's case falls squarely under *Totten*, that inquiry into the case would necessarily involve the precise nature of the alleged contractual understanding between the parties; including the parties' alleged responsibilities under the contract, a detailed description of the duties plaintiff may have actually performed, and a description of any action defendant may have taken pursuant to the contract. It is also said that plaintiff "would have to detail any dealings he may have had with particular officers of the CIA with respect to the formation of the alleged contract and the performance of duties pursuant to the contract, even though many of those CIA employees might work under cover."

Plaintiff's response is that *Totten* involved a direct spy, while plaintiff acted more as an administrative

employee of the CIA, sent to set up a business, run the intelligence gatherers through his business as a front operation, and manufacture ties to be sent back to the United States and sold by the domestic corporations. We are told that plaintiff's information gathering role was insignificant compared to his administrative functions as a corporate businessman; and that his suit is for acting as a corporate businessman, setting up two corporations, providing employment roles and meeting places, and providing day-to-day information on the political climate in Mauritius. We are also told that very little of a secret nature is left in the case, and what there is can be disclosed *in camera* in the court's discretion.

On what we now have before us, we have to say that plaintiff's case falls under *Totten*. This is not a suit between private parties. The contract, if there was one, was with the United States; according to plaintiff he was to engage significantly in undercover intelligence work for the Government; his alleged dealings seem to have been oral and very probably with CIA operations not otherwise known to the public. We doubt very much that plaintiff could make his case, or the defendant put up its defense, without revealing secret matters which should not be disclosed. In the words of *Totten*, both plaintiff and the Government "must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment * * *." 92 U.S. at 106. The agents in such a secret service "must look for their compensation to the contingent fund of the department employing them, and to such allowances from it as those who dispense that fund may award. The secrecy which

those contracts impose precludes any action for their enforcement." 92 U.S. at 107. Those holdings all seem to apply here. They have been summarily reaffirmed in *United States* v. *Reynolds*, 345 U.S. 1, 11 n.26 (1953).

IT IS THEREFORE ORDERED, without oral argument, that defendant's motion to dismiss is granted and the petition is dismissed.

BY THE COURT

/s/ Oscar H. Davis
OSCAR H. DAVIS
Judge, Presiding

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